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CHARLES ELMORE DROPLE  
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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No. 1020

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JEFFERSON COUNTY, TENNESSEE,

*Petitioner,*

*vs.*

TENNESSEE VALLEY AUTHORITY

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PETITION FOR REHEARING

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M. W. EGERTON,

*Counsel for Petitioner.*

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1944

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JEFFERSON COUNTY, TENNESSEE,  
*Petitioner,*  
*vs.*  
TENNESSEE VALLEY AUTHORITY,  
*Respondent*

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**PETITION FOR REHEARING**

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*To the Honorable the Supreme Court of the United States:*

Comes now Jefferson County, Tennessee, petitioner in the above entitled cause, and presents this its petition for a rehearing of the action of the Court in denying its petition for a writ of certiorari and respectfully urges the Court to rehear and grant this writ.

**I**

In the brief filed herein on behalf of the respondent, the respondent undertakes to present as its defense to this action work done by it in replacing certain roads located within the territorial boundaries of petitioner where the replacement and reconstruction of these roads was made

necessary by reason of flooding caused by respondent. The picture of the situation as presented by respondent is that respondent at great expense has reconstructed and replaced roads belonging to petitioner; that the cost of replacing these roads was in excess of their value; that the amount expended by respondent in replacing these roads should be accepted as a satisfaction of the liability of respondent to petitioner.

A copy of this brief was served on petitioner on April 3, 1945. Promptly upon receipt of a copy of the brief on behalf of respondent, petitioner prepared for printing a reply brief pointing out to the court that the position taken by respondent was without support in the record and contrary to the contract between the parties.

The sole question in this case is "*whether or not the Tennessee Valley Authority is liable in damages for the taking of some 95 miles of other roads which cannot and will not be replaced and for the replacement of which no duty rests upon plaintiff County*" (R. 42).

At the hearing in the District Court, affidavits were offered showing the extent of the work done by respondent under its contract with the County. Objection was made to the consideration of this evidence. The District Court ruled:

"By the terms of the contract between the plaintiff County and defendant Authority, it is provided that nothing in the contract releases or may be pled in defense to any action by the County.

"The Court is therefore of the opinion that evidence of the extent and value of the work done by the defendant Authority under its contract with Jefferson County is inadmissible under the terms of the contract between the County and the Authority, and those parts of the affidavit of Frank W. Webster dealing with the character, value and extent of the work done by the Authority under the contract are excluded" (R. 42).

The Court then excludes from consideration affidavits for work done under the contract and sets out in detail those parts of the affidavits so excluded.

No exception to this ruling has been pressed and no error was assigned to this action. Therefore, evidence of the cost and character of roads rebuilt under the contract is not before this Court and under the contract between the parties cannot be before this Court, for the contract itself provides "nothing in this agreement shall operate to release any such right or be pled in defense to any suit brought by the County to recover damages for any such taking" (R. 10).

And the contract further provides: "it is the contention of the Authority that it is not legally liable for the taking of any such right of way or road and that no provable damage arises from any such taking, while the County contends that it suffers substantial damage due to such taking for which the Authority is liable."

It follows, therefore, that the sole question in this Court is whether the respondent is liable to petitioner for taking roads valued at \$357,658.00 which have not been replaced and could not be replaced by reason of the flooding of the territory which they served by the backwaters of a dam constructed by respondent.

The fact that it is not necessary to rebuild the roads does not restore to the County the value of the roads taken.

The County had property with a value of \$357,658.00 *in addition* to roads serving territory not flooded. It now has roads serving territory not flooded but it has lost \$357,658.00. The County specifically declined to enter into an agreement with respondent which sacrificed this \$357,658.00 and the contract which was finally accepted fully protects this right and respondent agreed that nothing done should destroy this right of the County. If roads are property, then the County has had taken from it \$357,658.00 for which it has not been paid.

The theory advanced by respondent in its brief, that payment for roads requiring replacement is a satisfaction of all liability of respondent to petitioner, completely ignores the contract between the parties and there is no evidence in the record under the ruling of the District Court to support any such contention.

On the other hand, if the Court is to hold that roads are not property within the meaning of the Fifth Amendment of the Constitution, as was held by the District Court and the Circuit Court of Appeals by their holding that no liability exists for such a taking, then the Court must overrule its decision in *St. Louis v. Western Union Telegraph Company*, 148 U. S. 92.

The decision of the Court denying the writ of certiorari in this case was announced on April 9, 1945, and although petitioner acted promptly to call the attention of the Court to the fact that Respondent's theory as advanced in its brief was contrary to the contract between the parties and the record, this reply brief did not reach the Court in time to be considered prior to the announcement of its decision.

## II

Petitioner is a public corporation of the State of Tennessee. It has no stockholders and no private gain or purpose to serve. In good faith and in an endeavor to cooperate with a corporation of the United States, it enters into a contract with that corporation reserving to itself the right to recover the value of roads taken by such a corporation and specifically providing in its contract that the replacement of roads taken, to the extent that they were replaced, should not constitute a defense to an action for roads taken and not replaced.

No decision of the Supreme Court of the United States has yet denied to a private corporation the right to recover the value of property taken from it by the United States or

any of its agencies. The question of the measure of damages and liability for the taking of roads by an agency of the United States is now pending in the States of California, Texas, Kentucky, West Virginia and perhaps others unknown to petitioner. If roads are not property and no liability therefor exists for their taking, the various states and their agencies should be so advised by an authoritative decision of this Court.

### III

Counties build roads not for the service of a particular part of the county alone, but for all of the county. The cost of construction is a county-wide cost, not just a cost assessed against abutting property owners. Where its roads are taken, the loss does not fall upon the abutting property owners (and particularly is this true where the abutting property is freed from liability for taxation by passing into the hands of the Federal Government), but it falls upon the remaining property owners of the county. Their loss is real. Their property right has heretofore been recognized by this Court. To deny it and to deny a recovery for the taking of its property is a factual injustice to the corporate taxpayers who have paid for the property or who must continue to pay therefor in discharging bonds outstanding.

Petitioner is unable to accept such a factual injustice as being in accordance with the provisions of the Fifth Amendment of the Constitution.

Petitioner, therefore, most earnestly prays that this Honorable Court rehear its application for a petition for certiorari: (1) Because respondent in its brief adopted and presented to this Court a theory contrary to the contract between the parties and based upon evidence specifically excluded from the record by the District Court; (2) Because the matter involved is of public interest, not alone to peti-

tioner but to others having similar problems in many other States; (3) Because the factual injustice done to petitioner as a public body should not stand as the law of the land in the absence of full consideration by this Honorable Court; and (4) For the reasons in the original petition set out.

Respectfully submitted,

M. W. EGERTON,  
*Counsel for Petitioner.*

I, M. W. Egerton, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

M. W. EGERTON,  
*Counsel for Petitioner.*

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